No. 76-213

Supreme Court, U. S.
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In the Supreme Court of the United States

OCTOBER TERM, 1976

BYRON L. DORGAN, ETC., ET AL., APPELLANTS

v.

UNITED STATES OF AMERICA AND WESTERN ELECTRIC COMPANY, INCORPORATED

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NORTH DAKOTA

MOTION TO AFFIRM

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Pursuant to Rule 16(1)(c) of the Rules of this Court, the United States and Western Electric Company, Incorporated, move that the order of the district court be affirmed.

STATEMENT

This is a direct appeal from the memorandum and order of a three-judge district court (J.S. App. A-1 to A-8) enjoining appellants, the State Tax Commissioner of the State of North Dakota and related officials, from assessing and collecting state taxes, pending a final determination by the federal courts whether the United States and Western Electric Company are immune from such taxes under the Supremacy Clause of the Constitution.

The pertinent facts may be summarized as follows: The United States Department of the Army contracted with Western Electric to design and install certain equipment at "Safeguard System" missile bases in North Dakota

(J.S. App. C-2). Under the contract, the United States is obligated to reimburse Western Electric for state sales and use taxes which it is obligated to pay with respect to property acquired for the performance of the contract (J.S. App. A-5).

The North Dakota tax officials announced their intention to impose sales and use taxes upon Western Electric because of its acquisition of property under its contract with the Army. The United States and Western Electric then brought an action in the United States District Court for the District of North Dakota for a declaratory judgment that the state taxes were barred by the constitutional immunity of the federal government. The following day, Western Electric received from the state a "Notice of Determination," asserting that it owed more than 54 million dollars in sales and use taxes, and that the tax would become final unless Western Electric applied for an administrative hearing (J.S. App. C-2).

Before any state administrative hearing was held, a single-judge district court, upon application of the United States and Western Electric, stayed the state tax proceedings pending the outcome of the federal declaratory judgment action (J.S. App. B-1 to B-12, C-2 to C-3). However, the court of appeals held that under 28 U.S.C. 2281, a single judge had no jurisdiction to stay the state tax proceedings. It accordingly vacated the stay and remanded the case to the district court for further proceedings (J.S. App. C-1 to C-12).

The United States and Western Electric renewed their request for a stay of the state proceedings before a three-judge district court. After a hearing, the court stayed the state tax administrative proceedings pending the outcome

of the federal declaratory judgment action (J.S. App. A-7).[1]

ARGUMENT

The three-judge district court correctly enjoined further state tax enforcement proceedings pending disposition of the federal immunity suit in the federal court.

1. As the district court recognized (J.S. App. A-4), it is well settled that the United States has the right to litigate its immunity from state taxation in a federal court. *Board of Commissioners of Pawnee County, Okl.* v. *United States*, 139 F. 2d 248, 250-251 (C.A. 10); *Leiter Minerals, Inc.* v. *United States*, 352 U.S. 220, 227-228; see 28 U.S.C. 1345. Thus, where, as here, the United States brings suit in a federal court for a declaratory judgment of its tax immunity, the federal court has broad discretion to enjoin state tax proceedings which would conflict with the authority of the federal court and thereby irreparably injure the federal government. *Leiter Minerals, Inc.* v. *United States, supra*, 352 U.S. at 226-227, affirming 224 F. 2d 381, 384 (C.A. 5); *Deckert* v. *Independence Corp.*, 311 U.S. 282; *United States* v. *Corrick*, 298 U.S. 435, 437-438. See also *Eden Memorial Park Ass'n* v. *United States*, 300 F. 2d 432, 437 (C.A. 9); *United States* v. *Department of Revenue of State of Illinois*, 191 F. Supp. 723, 726-727 (N.D. Ill.), vacated on other grounds, 368 U.S. 30; *United States* v. *Okaloosa County, Fla.*, 59 F. Supp. 426 (N.D. Fla.).[2]

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[1]The court did not stay certain audit and other preliminary activities of the North Dakota tax officials (J.S. App. A-8).

[2]*Spector Motor Service, Inc.* v. *O'Connor*, 340 U.S. 602, upon which appellants rely (J.S. 20), is consistent with the decision below. There, a federal court enjoined the collection of a state tax during the pendency of a state court proceeding (*id.* at 604). While the validity of

There is ample support for the district court's finding (J.S. App. A-2 to A-4) that the United States and Western Electric will sustain irreparable injury unless the state tax proceedings were stayed. As the court explained (J.S. App. A-4 to A-5), if the state tax proceedings were permitted to go forward, any state court decision that Western Electric was liable for the taxes might be *res judicata* in the federal action and possibly require the United States to reimburse Western Electric under their contract. Although appellants argue (J.S. 18) that the United States could intervene in the state tax proceedings, they ignore the settled right of the United States to litigate its state tax immunity in federal court.[3]

Moreover, in the absence of a stay, the parties could be subject to conflicting judgments. As the district court stated (J.S. App. A-5 to A-6), if the state tax proceedings were not enjoined, Western Electric might be held liable for the state taxes, while the federal courts might hold the United States immune.

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the tax was litigated in the state courts, that procedure was employed at the direction of this Court, which first ruled that the determination of state law might make it unnecessary to decide the federal constitutional questions. See *Spector Motor Service, Inc.* v. *McLaughlin*, 323 U.S. 101. Here, however, the ultimate question is one of federal tax immunity.

[3]Contrary to appellants' argument (J.S. 19-20), it is not appropriate for the federal court to abstain from exercising its jurisdiction pending state court disposition in a case where the United States asserts its immunity from state taxes on the basis of federal law. *American Nat. Red Cross* v. *Department of Employment*, 263 F. Supp. 581, 585 (D. Colo.) (three-judge court), affirmed *sub nom. Dept. of Employment* v. *United States*, 385 U.S. 355, 357-358. Moreover, none of the traditional bases for abstention from federal jurisdiction is present here. *Colorado River Water Conservation Dist.* v. *United States*, No. 74-940, decided March 24, 1976, slip op. 12-15.

Although appellants apparently concede (J.S. 16-17) that without a stay the United States might have to reimburse Western Electric for any state taxes held to be due, they nevertheless contend that such payment would not constitute irreparable injury. But assuming *arguendo* that the United States could eventually recover the tax payments as a result of a federal court judgment recognizing its immunity from state taxation, the temporary payment of the deficiency in this case, which exceeds $54 million, would constitute irreparable injury to the federal government. *Board of Commissioners of Pawnee County, Okl.* v. *United States, supra*, 139 F. 2d at 251; *United States* v. *Livingston*, 179 F. Supp. 9, 12 (E.D.S.C.), affirmed, 364 U.S. 281; *City of Springfield* v. *United States*, 99 F. 2d 860, 862 (C.A. 1). Here, as in the cited cases, the undisputed evidence shows that a Congressional appropriation would be necessary to pay the state taxes (Affidavits of Maj. Gen. Richard L. West and Col. Harris W. Woods, filed in the district court, Appendix, *infra*, pp. 1a-5a).

The district court also correctly found (J.S. App. A-6) that there was a strong likelihood that the United States and Western Electric would succeed on the merits of their claim of immunity. Here, the government's claim to immunity rests upon the argument that Western Electric purchased materials on behalf of the United States and that title to these goods immediately vested in the United States. See, *e.g.*, *Kern-Limerick, Inc.* v. *Scurlock*, 347 U.S. 110, 117. Moreover, the North Dakota tax appears to favor contractors who deal with the state so as to discriminate against the United States and those with whom it deals. See *Phillips Co.* v. *Dumas School District*, 361 U.S. 376. In light of the authorities in support of the immunity claim and the fact that the $54 million tax deficiency was asserted by the State of North Dakota on the basis of an estimate without an audit (J.S. App. A-6), there was ample basis for the district

court to conclude that there is a substantial probability that the government and Western Electric would be able to show that all or a part of the taxes assessed were not owed.

3. Finally, appellants contend (J.S. 12-13, 19) that the district court's eight-page memorandum and order (J.S. App. A) does not comply with Rules 52(a) and 65(d) of the Federal Rules of Civil Procedure. However, the necessary factual findings, which are set forth in memorandum form, are in accord with the requirements of Rule 52(a). *McCawley* v. *Ozeanosun Compania, Maritime, S.A.*, 505 F. 2d 26, 30, n. 4 (C.A. 5); *Ass'n of Westinghouse Sal. Emp.* v. *Westinghouse E. Corp.*, 283 F. 2d 93 (C.A. 3). The memorandum and order likewise complies with Rule 65(d) because: (1) it sets forth the reasons for issuance of the stay (the avoidance of irreparable injury and the right of the federal government to litigate its tax immunity in the federal courts); (2) it is specific in its terms (restraining specific aspects of the state's administrative tax proceedings); and (3) it describes in detail the acts restrained (the administrative proceedings but not the audit).

CONCLUSION

For the foregoing reasons, the order of the district court should be affirmed.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

SCOTT P. CRAMPTON,
Assistant Attorney General.

LEONARD J. HENZKE, JR.,
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OCTOBER 1976.

DOJ-1976-10

APPENDIX

AFFIDAVIT

COMMONWEALTH OF VIRGINIA)

) SS.

COUNTY OF ARLINGTON)

MAJOR GENERAL RICHARD L. WEST, U.S. Army, being first duly sworn, deposes and says:

I am the Director of Army Budget, Office of the Comptroller of the Army, Headquarters, Department of the Army, Washington, D.C. I have occupied this position since 24 July 1974. I am responsible for the formulation and execution of the Army budget. I am also responsible for the development and establishment of the Army's overall integrated budgeting and funding policies. This function includes the requirements and specifications for budget management systems and the processes needed for appropriations and funds accounts administration.

I understand that the North Dakota Tax Commissioner has sought to impose a sales and use tax liability against Western Electric and its major subcontractors in an amount in excess of $68 million incident to their performance of the SAFEGUARD contract in North Dakota. I also understand that the SAFEGUARD contract requires the Army to reimburse Western Electric and its major subcontractors for all allowable costs incurred incident to contract performance, including any and all state and local taxes properly due and owing. I further understand that there are insufficient funds within the SAFEGUARD program to pay a $68 million tax assessment.

For each fiscal year, Congress makes specific appropriations for the Army based on detailed justification and cost breakdowns presented in support of budget requests. These appropriations are made under separate headings, each has a title and language describing the purpose as well as the time period for which the appropriation made thereunder is available. The major appropriations for the Army are as follows:

1. Research, Development, Test and Evaluation (RDTE) - two year availability.

2. Procurement (PROC) for aircraft, missile, wheeled vehicles, ammunition and others - three year availability.

3. Operation and Maintenance - one year availability.

4. Military Personnel (MPA) - one year availability.

5. Military Construction (MCA) - continuing availability.

Congress has insisted on maintaining the integrity of appropriations (see 31 U.S.C. 628). However, with Congressional approval, the Army may divert or "reprogram" funds from the specific purpose for which they were originally appropriated to a different use.

Based on data and information available to me, I have concluded that the $68,000,000 tax liability described above could not be paid by funds from other Army activities, since such funds have already been obligated, spent or are identified for programs approved by the Congress in authorization and appropriation actions. Reprograming does not appear to be an alternative course of action because a request to Congress to approve reprograming of funds from other appropriations must include a certification that the request is for an activity of unforeseen military necessity and of a higher priority than the activity from which funds are deleted. This would clearly not

be the case in this instance. If such a liability is ultimately determined to be due and owing North Dakota, the Army could only request that Congress appropriate funds for the payment of such sum.

The foregoing instrument was sworn and subscribed before me this 1st day of April, 1976.

(signed) R. L. West

RICHARD L. WEST

(signed) Ethel Florain Lucas

Notary Public

My commission expires 12 Dec. 78

AFFIDAVIT

COMMONWEALTH OF VIRGINIA)

) SS.

COUNTY OF ARLINGTON)

COLONEL HARRIS W. WOODS, U.S. Army, being first duly sworn, deposes and says:

I am the Chief of Budget and Manpower Office, Ballistic Missile Defense (BMD) Program Office at Arlington, Virginia. I serve as the primary staff officer for planning, programing and budgeting for the financial and manpower resources authorized and required for the BMD programs, including SAFEGUARD. On behalf of the BMD Program Manager, I manage and control the distribution and use of all financial and manpower resources approved by the Congress and the Office of Secretary of Defense for the BMD programs. Since 23 July 1971 I have been responsible for budgetary and financial matters for the BMD Organization.

I understand that the North Dakota Tax Commissioner has sought to impose a sales and use tax liability against Western Electric and its major subcontractors in an amount in excess of sixty-eight million dollars ($68,000,000) incident to their performance of the SAFEGUARD contract in North Dakota. I further understand that the SAFEGUARD contract requires the Army to reimburse Western Electric and its major subcontractors for all allowable costs incurred incident to contract performance, including any and all state and local taxes properly due and owing.

Of the money appropriated from year to year by Congress to finance the SAFEGUARD program, all of such money except a remnant thereof has either been paid out for work performed or is now owing for work which has been performed. The remnant referred to in the preceding sentence is an amount far less than the $68,000,000 amount alluded to in the preceding paragraph. If this $68,000,000 were ultimately determined to be due and owing to the State of North Dakota, then, to the best of my knowledge and belief, only after a new appropriation by Congress for the payment of such amount could this amount be paid.

(signed) Harris H. Woods

HARRIS H. WOODS

The foregoing instrument was sworn and subscribed before me on the twenty-fifth day of March, 1976.

(signed) Virginia P. Lessenger

VIRGINIA P. LESSENGER
Notary Public
Arlington County, Virginia

My Commission expires on
July 23, 1978